2-1-2010

# Kuhn v. Coldwell Banker Landmark, Inc. Appellant's Reply Brief Dckt. 29794

IN THE SUPREME COURT OF THE

STATE OF IDAHO

DARREN G. KUHN, an individual, SCHEI DEVELOPMENT CORPORATION, an Idaho corporation, ROGER J. SCHEI, an individual, and FRANCES R. SCHEI, an individual

Plaintiffs-Respondents,

vs.

COLDWELL BANKER LANDMARK, INC. n/k/a LANDMARK REAL ESTATE, INC., an Idaho corporation, KELLY FISHER, an individual, TODD BOHN, an individual and JOHN MERZLOCK, an individual,

Defendants-Appellants,

and

PROFESSIONAL ESCROW SERVICES, INC., an Idaho corporation, and RONALD BITTON, an individual,

Defendants-Non Appellants

**SUPREME COURT DOCKET NO. 29794**

Bannock County Case No. CVOC-00-0226A



# APPELLANTS' REPLY BRIEF

**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK**

The Honorable Peter D. McDermott, presiding.

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## *I. Plaintiffs' Rendition of the Facts to the Court are Misleading and do not Take into Account any disputes made by Defendants.*

Plaintiffs provide a very lengthy statement of the case that includes a set of what they purport to the Court to be facts, but are actually simply their versions of the facts without apprising the Court of the fact that they are disputed. Although such a detailed recitation of facts is wholly unnecessary for this Court to make decisions regarding possible errors of law made by the court below, Defendants would simply like to provide a few examples of Plaintiffs' errors in submitting to this Court what they call the "facts".

Some of the errant citations are errant because they do not address the fact that they were disputed. As just a couple of examples, Plaintiffs assert that "the Scheis were assured the Kuhn's home could be sold for $189,900 and they could sell it fast and they had a buyer and a back-up buyer." Resp't Br. 8. The only citations provided in support of that, though, come from the Scheis themselves. In fact, John Merzlock disputed that assertion in trial. Tr. Vol. I, p. 639, l. 7 - p. 641, l. 5. Plaintiffs, of course, made no mention of this disupte.

Similarly, Plaintiffs recite as a fact that John Merzlock lied to the appraiser, Wayne Harris, about whether or not there had already been an appraisal. Resp't Br. 9. In reality, John Merzlock disputed that and testified that he recalled telling Mr. Harris about the previous appraisal. Tr., Vol. I, p. 636, l. 7-13.

Some of Plaintiffs' statements as to what the facts of the case are, though, are almost shameful. When Plaintiffs set forth the facts regarding the alleged agreement that Defendants would indemnify Plaintiffs if the Mountain Park home was not sold in a year, they assert that Defendants' counsel admitted that the agreement was signed and "whited out." Resp't. Br. 12. Plaintiffs were at the trial of this matter and know well that counsel for Defendants made no such admission. Plaintiffs have made it clear in their briefing that there was some issue as to whether or not Defendants had whited-out certain portions of the agreements. This Court, even from the very limited context provided by Plaintiffs, can probably decipher that Defendants' counsel was making

a joke about the unfortunate turn of events during the trial. First of all, if it had never come up in trial, would the attorney for the Defendants really volunteer that information at the conference on jury instructions?

Secondly, and tellingly, Plaintiffs did not even react to the statement in the transcript. If, in fact, Plaintiffs' counsel had thought that this was truly an admission, there certainly would have been some conversation following this "admission." In reality, it was never discussed because *everyone* knew it was simply a joke. *See* Tr., Vol. IV, p. 3690, l. 17 - p. 3691, l. 24. It is truly disturbing that Plaintiffs' counsel would draft and sign a brief with this assertion when each one knows that this was no admission at all. Finally, Plaintiffs also improperly cite to depositions in their brief. *See* Resp't Br. 8, 11.

## *II. The Court should have found the punitive damages awarded by the jury in this matter excessive and unconstitutional.*

Defendants continue to contend that the excessiveness of the punitive damage award requires a remand. The fact that the award was well over three and four times the compensatory damages coupled with the fact that the compensatory damages themselves were so substantial leads to an unfair result. Proportionality is not the only factor to consider. However, Plaintiffs have not shown any degree of calculation, nor any real disregard for the rights of others. *Griff, Inc. v. Curry Bean Co., Inc.*, 138 Idaho 315, 322 (2003).

As set out in Defendants' opening brief, this award violates the due process clause. The United States Supreme Court has recognized that punitive damages are aimed at the purposes of deterrence and retribution, and that the Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a party. *See State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 417 (2003). In reviewing punitive damage awards, the U.S. Supreme Court has instructed courts to consider: (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award, and (3) the difference between the punitive damages awarded by the jury and the civil

penalties authorized or imposed in comparable cases. *Id.* at 418.

In making a determination with regard to the first consideration, a defendant's reprehensibility, the Supreme Court stated:

> To determine a defendant's reprehensibility- the most important indicium of a punitive damages award's reasonableness- a court must consider whether: the harm was physical rather than economic; the tortious conduct evinced an indifference to or a reckless disregard of the health and safety of others; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

*Id.* at 409.

Plaintiffs make much of the fact that Defendants argued that the harm was economical and not physical, but ignore the other portions of the reprehensibility guidepost. Though Plaintiffs assert that there was repeated misconduct, they offer no evidence of repeated violations because there are none. Repeated conduct surely contemplates similar conduct to other parties. There is no proof of that. Further, Plaintiffs provide no authority or citation to dispute that the Defendants conduct did not evince an indifference or a reckless disregard for the health and safety of others. How could they? This is a real estate transaction. Unless an agent knowingly sold property with harmful mold without disclosure, an agent's conduct will not affect the health and safety of others. Certainly, a more modest punishment could have satisfied the State's legitimate objectives.

Defendants understand and even cited the U.S. Supreme Court in *State Farm* with regard to there being no rigid benchmark as to punitive damages and the proportionality of the award. However, as above argued and argued in detail in the opening brief, considering the substantial award of compensatory damages, the punitive damages are excessive when taken in total with the lack of reprehensibility here. Again the compensatory damages resulted in awards of $179,219.64 in favor of Kuhn against these Defendants and $84,483 in favor of Scheis against these Defendants. The ratio of compensatory damages to punitive damages is 3.1-to-1 as to Kuhn and 4.3-to-1 as to

Scheis. Although these are single digit ratios, they are beyond the outermost limit of due process due to the substantial nature of the compensatory damages and the lack of reprehensibility.

Plaintiffs finally argue that Defendants did not even discuss the third guidepost, which is awards in similar cases. Defendants had not and still cannot find any case similar to the one at hand. Apparently neither can Plaintiffs as they provided no citations either. However, if the first two guideposts are not met, surely the award must be seen as excessive and a reversal or remand back to district court is warranted. Because the court below ignored the first two guideposts and there is no evidence available as to the third, the court erred. Indeed, the court's only reasoning below for denying Defendant's motion for a new trial based on the excessiveness of the award was that the disparity between what the court would have awarded and what was awarded did not "shock the conscience." R. Vol. IV, p. 866j. The court does not address the guideposts or any other actual law on the issue.

***III. The District Court erred in its rulings regarding all of Defendants' post-verdict motions.***

Plaintiffs' arguments that Defendants should not be granted any of their post-verdict motions fall short. The failure of the district court to grant Defendants' motions with regard to newly discovered evidence, fraud and misconduct of the opposing party, irregularities in the proceedings by the adverse party, and error of law is sufficient error to warrant a remand of this case. Additionally, though Defendants will rest on their opening brief with regard to the arguments, there is supporting grounds for a remand in the amount of damages awarded due to passion or prejudice and the denied motion for judgment notwithstanding the verdict.

***A. The Trial Court erred in denying Appellants' Motion for New Trial.***

**(1) Plaintiffs did not procedurally default by not filing the affidavits along with the motion for new trial.**

Plaintiffs attempt to argue that Defendants "procedurally defaulted" by failing to file an affidavit along with the motion for new trial. Resp't Br., 33. They argue that pursuant to Idaho R.

Civ. P. 59(a)(7) and 59(c), an affidavit must be filed. Plaintiffs, however, did not object to the use of the affidavits at the hearing and even provided opposing affidavits to attempt to rebut the points made in the affidavits provided by Defendants as set forth in rule 59(c). *See* R. Vol. IV, page 854-866. Further, nowhere in the court's order is the matter of timeliness taken up. *See* R. Vol. IV, page 866a-866s. They did all this without any objection to the timeliness of the filing of the affidavits at all. Indeed, Plaintiffs provided no brief in opposition to the motion for new trial arguing untimeliness. *See generally* R. Vol. IV. And now, on appeal, they are attempting to argue that the motion should not have been considered at all.

Plaintiffs' failure to make the timeliness argument below should result in a waiver of that argument with this Court. This Court has often found that failure to object below will not preserve the issue on appeal. *See inter alia State v. Beard*, 135 Idaho 641, 646 (Ct. App. 2001). While the cases, which make such law, have to do with an appellant who failed to object and then wants to appeal, the logic is the same. One must present the argument below to be able to present it on appeal. Plaintiffs cannot be allowed to ignore the alleged untimeliness of the affidavits below and then make the argument here on appeal. Plaintiffs waived their argument as to timeliness by appearing and arguing the matter without any objection as to timeliness.

Indeed in an Idaho case under the old rule, the Idaho Supreme Court found that not objecting to untimely affidavits waived the right to object to it on appeal. The court explained that:

> Section 7-604 of our code, granted to respondent the right to ten days, after service of the affidavits in support of the motion for a new trial, to serve and file counter affidavits. This right he could and did waive by appearing, by counsel, at the time and place of hearing the motion for a new trial and by participating therein without making of record objection to proceeding, or applying for additional time in which to serve and file counter affidavits.
> *Carey v. Lafferty*, 59 Idaho 578, 86 P.2d 168, 170 (1938).

The procedural facts in that case are quite similar to the one at hand. The Appellant moved for a new trial and filed affidavits after that motion. The Respondent argued the merits and won. The Appellants then appealed and the Respondent attempted to argue the untimeliness of the affidavits.

*Id.* at 169-170. Similarly Plaintiffs here have waived their right to this argument by appearing by counsel at the time and place of hearing the motion for a new trial and by participating therein without making record objection to proceeding. The timeliness of the affidavits cannot be an issue.

Further, as the trial court did not recognize the untimeliness of the affidavits and ruled on the motion based upon the merits, this Court can surely still consider the merits. Indeed, Idaho courts have ruled on this issue as well. As Plaintiffs have pointed out, the rule requires the submission of affidavits. It states that "when a motion for a new trial is based upon affidavits they shall be served with the motion." Idaho R. Civ. P. 59(c).

Addressing the language of that rule, the Idaho Court of Appeals has ruled that "upon a motion for a new trial on those grounds that require a supporting affidavit, the court is not required to act in the absence of such affidavit. *Ernst v. Hemenway and Moser Co., Inc.*, 120 Idaho 941, 944 (Ct. App. 1991) (citing *Park Stations, Inc. v. Hamilton*, 38 Colo. App. 216 (1976)). The Court went on to explaint that "the purpose of an affidavit is to give notice of facts previously unknown to the trial court which support the motion in question." *Id.* In *Ernst*, the Idaho Court of Appeals found that the court had knowledge of the irregularities, which included counsel for the defendants withholding evidence, which "prevented relevant evidence from being presented to the jury." *Id.* Jacquie Kuhn's testimony would have been relevant surely had her whereabouts been disclosed as required by the Idaho Rules of Civil Procedure and withholding her whereabouts prevented relevant evidence from being presented to the jury. Additionally, the credit report, which was also withheld by Plaintiffs, was relevant and would have certainly helped the jury in its decision.

While the affidavit in this matter was not filed with the motion, the Court had the affidavit in hand when it made the ruling along with affidavits in opposition as provided by Plaintiffs. *See*

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[1]In addition to the waiver provided by Plaintiffs by presenting opposing affidavits and failing to argue timeliness at the hearing, the court provided an extension for filing of briefs due to the court reporter being sick. *See* R. Vol. I, page 23. Many of Defendants' bases for moving for a new trial were based on having at least a partial transcript available.

R. Vol. IV, p. 866a-866s. Just as in *Ernst*, the court clearly ruled upon the merits and had the information available to it that it needed to have in order to make a ruling. *Id* at 866h. The court did not say anywhere in the record that it was refusing to make a ruling on the issue based upon the untimeliness of the accompanying affidavits. *Id* at 866a-866s. This was partly due to the extension granted by the court in order to obtain a copy of a partial transcript and for the Defendants to put together their brief. *See* R. Vol. I, p. 23.

The Idaho Court of Appeals' ruling in *Ernst* was upheld further in *Harris v. Alessi*, 141 Idaho 901 (Ct. App.2005). In *Harris*, the defendant did not file an affidavit with her motion for a new trial under Idaho R. Civ. P. 59(a)(1). The court ruled that:

> Although the district court acknowledged the absence of an affidavit as one reason for denial of the motion, the district court went on to consider the motion and denied it based upon the merits. The district court had first-hand knowledge of the proceedings in question. Therefore, we will also address Alessi's arguments on appeal.

*Harris*, 141 Idaho at 905 (Ct. App. 2005).

Here, the district court did not make any acknowledgment at all regarding untimely affidavits. Indeed, it went straight to the merits. R. Vol. IV, p. 866h. Again, the court had knowledge of what had happened. Plaintiffs, again, were able to and did submit opposing affidavits.

**(2) There were irregularities in the proceedings that should allow for remand for a new trial.**

Because timeliness is not an issue, this Court should rule that there were irregularities in the proceedings. Plaintiffs begin their argument in opposition to Defendant's appeal based on irregularities by indicating that the irregularities must be in the trial proceedings. Resp't Br., 33. Plaintiffs cite *Slaathaug v. Allstate Ins. Co.* , 132 Idaho 705 (1999) in support of their argument. However, nothing in the citation limits the irregularities to "trial proceedings". The rule does not specify that the proceedings actually be at trial. Indeed the word proceedings is defined by Black's Law Dictionary (not to mention common sense) as "the regular and orderly progression of a lawsuit,

including all acts and events between the time of commencement and the entry of judgment." Black's Law Dictionary "Proceeding" (8th Ed. 2004). This, of course, would include failing to disclose vital information in discovery as set out in Defendants' opening brief.

Plaintiffs argue then that the Affidavit of Lowell Hawkes was not fraught with hearsay and that a citation to the affidavit itself in the record is not sufficient. Resp't Br., 34. Defendants cite to the affidavit itself and also point out that Kelly Kumm could have provided an affidavit for Mr. Hawkes to avoid the hearsay in Mr. Hawkes' affidavit. App't. Opening Br. 21-22. Mr. Hawkes' affidavit at paragraph four details a conversation he had with Jacquie Kuhn (Jordan). Tr. Vol. IV, page 855. At paragraph 14, Mr. Hawkes alleges that Kelly Kumm acknowledged all sorts of damning evidence contrary to his signed affidavit. Tr. Vol. IV, page 858. If Kelly Kumm had actually made these acknowledgments, Mr. Hawkes could have simply acquired a counter affidavit from him correcting his original affidavit.

The misconduct of Plaintiffs should be readily obvious to this Court. When Jacquie Kuhn moved, her contact information changed. Plaintiffs were aware of the move and her new contact information. *See* R. Vol. III, page 561; *see also* R. Vol. IV, page 855. As she was listed as a party with information. Plaintiffs were obligated by the Idaho Rules of Civil Procedure to provide updated information without demand by the opposing party. Idaho R. Civ. P. 26(e)(1). Despite this affirmative duty, Defendants felt it necessary to make a demand for supplementation. R. Vol. IV, page 822-824. However, neither the affirmative duty to supplement, nor an explicit demand for supplementation, could persuade Plaintiffs to abide by the rules and they did not disclose Ms. Kuhn's whereabouts.

Plaintiffs have never argued that they were unaware of her whereabouts. Rather, their argument appears to be that Defendants should have contacted her while the information provided was correct. Resp't Br., 35. The trial in this matter took place in January, 2003, and Plaintiffs concealed here whereabouts from Defendants from November, 2001. Plaintiffs argue that the four months at the beginning of these proceedings should have been ample time for Defendants to contact

her, but Defendants were certainly not up against any deadlines by November, 2001, with the trial fifteen months away. *See id.* Plaintiffs cannot shift the fault to Defendants. It was Plaintiffs' duty to disclose Ms. Kuhn's whereabouts and they did not.

Plaintiffs then appear to argue that this was harmless. They argue that she testifies in her affidavit that she would have lied and that Judge McDermott found her to be incredible. *Id.* Respectfully, Judge McDermott made the determination as to Ms. Kuhn's credibility without ever having met her or allowing her cross-examination. She may have believed that she would have lied on the stand, but under the pressure of cross-examination, it is likely that the truth would have come out. *See* R. Vol. III, p. 561. In any case, Defendants should have been afforded the opportunity to at least depose her and find out.

When a motion for new trial is based upon misconduct, the moving party has only the burden to establish that the misconduct occurred, the party opposing the motion is then required to establish that the conduct ***could not*** have affected the outcome of the trial. *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 711 (1999)(emphasis added). An appellate court need not attempt to quantify the probability of a different result on retrial. It is sufficient that the error was prejudicial and that it reasonably ***could have*** affected the outcome of the trial. *Pierson v. Brooks*, 115 Idaho 529, 534 (Ct. App. 1989)(emphasis added). There is no doubt that there was misconduct and there was no doubt that the misconduct could have affected the outcome of the trial. Ms. Kuhn would have likely testified consistently with her affidavit.

Her testimony would have made it clear that Darren Kuhn lied about his credit problems and hid documents regarding his credit history from Defendants despite a Request for Production for those documents. *See* R. Vol. III, p. 560-565. Darren Kuhn testified under oath that he was not aware that Robert Jones performed an appraisal on the Manning Lane house until it came up during the trial. Specifically, he said:

> Q. Until learning of it in this trial, did you know that Robert Jones had, in fact, done – well, let me back up. You knew he was going to do two appraisals?

A. I knew someone was supposed to do two appraisals.
Q. You didn't pick him?
A. No.
. . . .
Q. Did you play any part in picking Mr. Jones?
A. No.
Q. But you were agreeable to rely and trust Mr. Merzlock and Mr. Bohn to make a judgment call as to who would be a fair and common appraiser for both properties?
A. Yes.
Q. Did you at any time prior to hearing it in court, realize that the appraisal that Mr. Jones, in fact, came in with was $261,000?
A. No. I was never told of that appraisal.

Tr. Vol. IV, p. 3656, l.14 - p. 3658, l. 7.

As set out in Defendants' opening brief, Jacqueline Kuhn and Kelly Kumm testified to the contrary in their affidavit. *See* R. Vol. III, p. 560-565 and 574-619. Had Jacquie Kuhn been made available by Plaintiffs, Defendants would have been able to provide evidence that Darren Kuhn was not being truthful.

Further, Kuhn's position at trial was that he had decent credit prior to the purchase of Manning Lane but that the foreclosure on Mountain Park destroyed his credit. He testified that his credit would have gone up from a "B" rating to an "A" rating but for the foreclosure. Tr. Vol. II, p. 1532, l. 13 - p. 1533, l. 1. In discovery, the Defendants requested that Kuhn provide copies of all credit reports for himself or his business. *See* R. Vol. III, p. 650. Kuhn provided a credit report for July 28, 1997 and a credit report for June 4, 2002. *Id.* at 654; *see also* R. Exhibits 302 and ZZZZ attached to original transcript. These were to constitute a "before and after" snapshot of his credit– before buying Manning Lane and after the foreclosure. He used these two reports to establish his damages and the expert used them in making in determination of damages. *See* Tr. Vol. III, p. 2245, l.16 - p. 2248, l. 18.

The Defendants, however, after communicating with Jacquie Kuhn following the trial, found out about a third credit report. Darren used this third report in his divorce case, but never provided it to Defendants in this case despite a clear and unequivocal discovery request that he do so. This third credit report is material because it is dated July 29, 1999, which is long after the Kuhns bought Manning Lane but only two months before the Scheis quit making lease payments on Mountain Park. That credit report shows that Darren Kuhn had a "C" rating even before the foreclosure on Mountain. Park. *See* R. Vol. III, p. 575, 585.

Plaintiff Darren Kuhn's misconduct extended not only to his not apprising Defendants of Ms. Kuhn's whereabouts despite an affirmative duty to do so under the Idaho Rules of Civil Procedure and despite an affirmative demand for supplementation. *See* Idaho R. Civ. P. 26(e)(1)(A); R. Vol. III, p. 635; R. Vol. IV, p. 822. His misconduct was also evidenced by his not providing the credit report that surfaced after Ms. Kuhn approached Defendants' counsel. As set out in the opening brief, the credit report was available to him and a request was made of him to produce all credit reports, but he did not provide or list this particular credit report. *See* R. Vol. III, p. 650. It is also important to note that in the opposing affidavits, neither Bron Rammell nor Lowell Hawkes even addresses the fact that the credit report was not submitted in discovery. *See* R. Vol. IV, p. 854-865. And the court still chose to ignore it. *See* R. Vol. IV, p. 866a-866s.

Again, these irregularities and misconducts perpetrated by Plaintiffs in this matter could have easily altered the course of the trial or the result. Defendants must not prove that they *would have* altered the course of the trial or the result, but rather only that they *could have* altered the result. The district court either misread or misinterpreted the law when it ruled that "had Jacqueline testified at trial, based on her Affidavit, her testimony probably would not have altered the result." R. Vol. IV page 866c. As above discussed, the standard is whether the evidence "could have" altered the result. *Pierson*, 115 Idaho at 534 (Ct. App. 1989). Courts have also explained the standard as "whether the irregularity had any effect on the jury's decision." *Schmechel v. Dillé, M.D.*, 148 Idaho 176, 219 P.3d 1192, 1196 (2009). Given all of the above, it is clear that this irregularity could have altered

the result and that it would have had an effect on the jury's decision.

**(3) There is newly discovered material evidence.**

There is little reason to provide further argument with regard to this issue as all of the newly discovered evidence is already noted above and in the opening brief. The same facts that constitute misconduct constitute newly discovered material evidence in this case. Every shred of newly discovered evidence in this matter came about due to irregularities in the proceedings. Jacquie Kuhn's testimony is clear and set out in her affidavit. *See* R. Vol. III, page 560-565.

Plaintiffs provide little argument to rebut the mounds of new evidence that came forward due to them not abiding by the rules of civil procedure and disclosing her new whereabouts nor disclosing the credit report, which clearly should have been disclosed. This credit report, though, as shown in Defendants' opening brief, changes the entire testimony of Plaintiffs' economist. Much of the damages as set out by Plaintiffs' economist were based on the credit reports. *See* Tr. Vol. III, p. 2245, l.16 - p. 2248, l. 18. Plaintiff does not dispute the argument about the credit reports except to say that the trial court found no misconduct. Plaintiffs simply have no answer.

**(4) The errors of law committed by the district court are such that the court should have granted the motion for new trial**

At trial, Defendants attempted to introduce statements made by Jacqueline Kuhn. *See* discussion *infra* Part V. Plaintiffs claimed that such statements were hearsay. Defendants argued, as will be discussed below, that they were admissions by a party-opponent. Darren Kuhn testified that he gave Jackie authority to enter into contracts in his name. She was acting as his agent throughout the events that led to this lawsuit. *See* discussion *supra* Part IV.B.1. Under Rule 801(d)(2), the Court erred in not allowing the Defendants to testify regarding statements made by Jacquie. Improper admission of evidence is a proper ground for a new trial under Rule 59(a)(1). *See, Pierson v. Brooks,* 115 Idaho 529 (Ct. App. 1989). Consequently, the improper exclusion of admissible evidence should also be a proper ground for a new trial under Rule 59(a)(1). The trial court has a duty to grant a new trial where prejudicial errors of law have occurred, even though the

verdict is supported by substantial and competent evidence. *Schaefer v. Ready,* 134 Idaho 378, 380 (Ct. App. 2000). Defendants are entitled to a new trial because of the errors of law set out above.

Defendants continue to assert that there were errors of law committed by Judge McDermott at the trial of this matter, but will take those matters up below in the section setting out mistaken evidentiary rulings. These errors of law were certainly significant enough to warrant a new trial under the 59(a)(7) motion made by Defendants following the conclusion of the trial, but they will be discussed in their entirety in section V below.

### *B. Defendants' motion for relief pursuant to rule 60(b) should have been granted by the court below.*

Plaintiffs argue that Defendants have not met the burden required for fraud under rule 60(b)(3), but as set out in the rule, relief can be granted for "fraud, misrepresentation, **or other misconduct of an adverse party**." Idaho R. Civ. P. 60(b)(3)(emphasis added). Defendants have set out the various instances of Plaintiffs' misconduct throughout the opening brief and this present reply brief and there is no need to repeat them now. However, it is important to note that this misconduct is similar to what is anticipated in the rule. Indeed, federal courts have determined such misconduct can arise from failure to properly disclose information in discovery, even if it was accidental. The first circuit court of appeals has said:

> Failure to disclose or produce materials requested in discovery can constitute "misconduct" within the purview of this subsection. *See Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978). Misconduct does not demand proof of nefarious intent or purpose as a prerequisite to redress .... The term can cover even accidental omissions. . . . We think such a construction not overly harsh; it takes scant imagination to conjure up discovery responses which, though made in good faith, are so ineptly researched or lackadaisical that they deny the opposing party a fair trial. *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988).

Other federal courts have also found that failure to disclose or produce information requested in discovery can constitute misconduct within the purview of 60(b)(3). *See inter alia Summers v. Howard* Univ., 374 F. 3d 1188 (D.C. 2004); *Cummings v. General Motors Corp.*, 365 F.3d 944, 955

(10th Cir. 2004); *Abrahamsen v. Trans-State Express, Inc.*, 92 F.3d 425, 428 (6th Cir. 1996); *Schultz v. Butcher*, 24 F.3d 626, 630 (4th Cir. 1994); *Stridiron v. Stridiron*, 698 F.2d 204, 207 (3d. Cir. 1983).

Though Defendants can find no such case law in Idaho, federal courts operate under almost exactly the same rule as was cited in this case in seeking for relief. Whether Plaintiffs misconduct in not supplying the discovery requested by Defendants and required under the civil rules was fraudulent and purposeful or negligent and accidental, relief is still available to Defendants under Idaho R. Civ. P. 60(b)(3), and the failure to supplement discovery when required under the rule, and especially when called upon to do so by supplemental demand as set out in Defendants' opening brief, must qualify the Defendants for relief under this statute.

In any case, the standards for fraud are met here. In order to show fraud, Defendants are required to show (1) "a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury." *Partout v. Harper*, 145 Idaho 683, 688 (2008) (citing *Maroun v. Wyreless Sys., Inc.*, 141 Idaho 605, 615 (2005)). Defendants have set out these bases for fraud over and over in different sections of both this and the opening brief, but will do so again.

Plaintiffs, by failing to respond to supplementation requests and failing to supplement as required under the rules regarding Ms. Kuhn's whereabouts, made a representation either that they did not know where she was or that she was still at the address listed in Plaintiffs' original discovery responses. The Affidavit of Jacquie Kuhn shows that this representation was false. R. Vol. III, page 561. Plaintiffs have never denied this by affidavit or even in their briefs. Clearly, as evidenced by the information produced in her affidavit, her whereabouts were material to the issue at hand. *See id.* at 560-565.

Also as evidenced by the affidavit of Jacquie Kuhn and the fact that it was never objected to by affidavit or by Plaintiffs' briefs, Mr. Kuhn knew of the falsity of the old address. Next, every discovery response is made with the expectation of reliance. To argue otherwise would be

ridiculous. As to requirement number six, Defendants had no idea where Ms. Kuhn was and why she was unavailable, but again one always relies on the discovery responses made by a party to an action. Defendant obviously relied on the information given by Plaintiffs as Ms. Kuhn was not at the trial of the matter. Defendants assumed she was simply lost. That reliance was justifiable as it came from a discovery response and it resulted in serious injury to Defendants as they were deprived of testimony that would have shown dishonesty on the part of Plaintiffs and would have produced a credit report that would have thwarted Plaintiffs' economist's testimony. *See* R., Vol. III, page 560-565, 574-575, 585-593.

Plaintiffs made no real arguments as to why the elements of fraud were not met except to put quotation marks around the word facts to intimate that they were untrue. Resp't Br. 40-41. This cannot suffice. And certainly if Defendants have provided affidavits setting out facts and Plaintiffs essentially do nothing to dispute them, that must qualify as proof by clear and convincing evidence. In any case, even if this Court decides that Plaintiffs cannot meet the burden for fraud, there has certainly been misconduct as set out above.

The argument for fraud carries over to the credit report as well that, as set out in Defendants' opening brief, was not provided in discovery. Not providing that report was a representation that they did not have it. That representation is false. It is certainly material as their expert relied on credit reports to determine damages. *See* Tr. Vol. III, p. 2245, l.16 - p. 2248, l. 18. Darren knew it existed as he used it in his divorce proceedings. *See* R. Vol. III, p. 574-576. Darren must have expected reliance on there not being another credit report as he allowed his expert to compute damages without acknowledging it. Neither the jury, nor the court, nor the Defendants could have possibly known about it without disclosure especially considering the fact that Jacquie Kuhn's whereabouts were also concealed. The jury, the court and the Defendants relied justifiably on Darren Kuhn's discovery responses and damages have been discussed previously.

It is telling that Plaintiffs do not dispute that the credit report was material and that it was not provided to Defendants. *See generally* Resp't Br.; *See also* R. Vol. IV, p. 854-865. They also do

not dispute that its revelation would have drastically altered the course of the trial. Damages would have been very different if Mr. Kuhn had disclosed this credit report as requested in Defendants' written discovery.

Defendants, if they cannot be granted a remand based on rule 59(a)(4) for newly discovered evidence, can still be granted one based on 60(b)(2). Although Defendants continue to assert that Plaintiffs' argument regarding the tardiness of the affidavits was waived by Plaintiffs not pursuing the matter below, if the court finds otherwise, Plaintiffs should have been granted relief under rule 60(b)(2). Rule 60(b)(2) reads that relief may be granted for "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b)." Idaho R. Civ. P. 60(b)(2). Obviously the same standards and arguments as apply to a motion under rule 59(a)(4), also apply to a motion under rule 60(b)(2). No further arguments should be necessary to supplement those made in support of the 59(a)(4) argument made above and in the opening brief.

## *IV. The Court Made a Number of Erroneous Evidentiary Rulings that Require a Remand in this Matter.*

### *A. Statute of Frauds.*

Plaintiffs make three arguments as to why the court's ruling on the statute of frauds should not be overturned. They argue that it should not be overturned because it was a mutually acknowledged contract. This is not the case. Plaintiffs know this is not the case and can provide no citations for why it would be. Mr. Kuhn may have testified that such a representation was made as set out in the citations in Plaintiffs' brief, but Mr. Fisher adamantly denies that any such conversation took place. Mr. Fisher was asked if he at any time agreed that Coldwell Banker would indemnify the Kuhns if the Mountain Park property did not sell. He responded "I never did tell anyone that we would indemnify the Kuhns." Tr. Vol. IV, p. 3187, l. 9-10. This is clearly not an acknowledgment. He goes on to say that he never agreed to personally indemnify the Kuhns either and that he never told Bron Rammell he would agree to it. Tr. Vol. IV, p. 3186, l. 5 - p. 3188, l. 25. Plaintiffs argument here fails quickly.

Plaintiffs next argue that there was partial performance. That argument also fails quickly by virtue of common sense and case law. First of all, there can be no partial performance on this alleged agreement. The agreement was for indemnification if Coldwell Banker could not sell the Mountain Park property within one year. That is the crux of the agreement. How could there be partial performance in this matter? Plaintiffs provide absolutely no reasoning as to what the partial performance might have been.

In any case, one of the reasons that this alleged agreement falls under the purview of the statute of frauds is because it was for a contract that could not be completed within a year. *See* Idaho Code § 9-505(4). Plaintiffs made no argument as to why this agreement would not fall under that classification. *See* Resp't Br., 37-38. In such cases, the doctrine of partial performance cannot apply. The Idaho Supreme Court has said "it has long been established in Idaho law that the doctrine of part performance is not applicable to a contract which comes within the statute of frauds because it cannot be performed within one year." *Treasure Valley Gastroenterology Specialists, P.A. v. Woods*, 135 Idaho 485, 489 (Ct. App. 2001). Plaintiffs argument fails immediately here as well.

Plaintiffs' final argument with regard to the statute of frauds consists really of just one sentence. They argue that "A person who misrepresents [sic] the requirements of the statute of frauds have been met, is liable for the consequences of that misrepresentation." Resp't Br., 37. First of all, the citation provided by Plaintiffs to support this argument came from Texas and thus is not binding on this court. There is no Idaho law to support that contention. Additionally, the case cited was a reversal of a summary judgment granted. *Placer Energy Corp. v. E & S Oil Co. Inc.*, 692 S.W.2d 197, 200 (1985).

Defendants would contend that this argument fails on its face. If true, all that a plaintiff would have to do is make baseless allegations of misrepresentation and the statute of frauds defense would be waived. This cannot be the intention of Idaho's lawmakers. The fact that there is no Idaho law cited by Plaintiffs in support of this argument is telling as well. Indeed, when the court made the decision below, it did not provide any law in support of the decision, citing instead fairness. *See* Tr.

Vol. II, p. 1636, l. 4-12. But this is not a question of equity. This is a question of applying the law as it stands in Idaho. The court did not do that.

Even if this court were to adopt the law as cited by Plaintiffs, their argument would still fail. The next sentence from the case indicates that "if the factfinder believes that appellees misrepresented the existence of a written assignment in order to obtain a valuable service from appellant, then appellant is entitled to recover the value of that service." *Id.* The factfinders in this matter, the jury, never made such a finding. The court made the decision for them by allowing any and all evidence regarding this oral agreement to come in and not giving any instruction as to the statute of frauds. *See* Tr. Vol. II, p. 1631, l. 12 - p. 1638, l.3. The court ruled as follows:

> Well, the jury has to make, obviously, a decision on this case, and they're the sole judges of the credibility of the witnesses in order for them to, and this is part of plaintiffs' evidence. In order for them to have the total picture here of what allegedly occurred, I don't think it would be fair to keep this from the jury, and they could do what they want with it.

Tr. Vol. II, p. 1636, l. 4-12.

The court allowed all of the evidence to come in, but acknowledged that the jurors were the factfinders as to credibility. Under the Texas law, the court may have been without error up to this point. However, when the court declined the statute of frauds jury instruction, it took the factfinding away from the jurors. *See* Tr. Vol. IV p. 3689, l. 17 - p. 3690, l. 6. The jury was never aware at all that the statute of frauds existed. If the court wants to allow the factfinders to make the determination as to whether there was a misrepresentation in this particular regard or not, it must have included something in that regard in the special verdict form, or at least allow an instruction on the statute of frauds.

Plaintiffs appear to contend that because the jury found Coldwell Banker liable for punitive damages, that constitutes a finding that Coldwell Banker made the particular representation as alleged by Darren Kuhn. This argument, if indeed it is the argument Plaintiffs are making, is nonsensical. Coldwell Banker, according to the special verdict form, was found to have acted with

fraud, wantonness, **or** gross negligence. R. Vol. II, p. 312 (emphasis added). The jury did not respond specifically to this issue even if they found fraud instead of possible wantonness or gross negligence and certainly did not respond as to whether there was fraud with regard to that one particular issue as would have been necessary to be able to allow the testimony in violation of the statute of frauds.

The jury did not have the option to make a decision about whether the statute of frauds should apply or not. If it had applied, they would have had to be instructed. Again, the court's reasoning below for not allowing the instruction boils down to fairness. In response to the suggested instruction, the court ruled as follows:

> The testimony was that — there was allegedly an agreement, but it's disputed. But Mr. Rammell reduced it to writing and sent it over to Kelly Fisher and it never was signed. I don't think under all the facts of this case, I don't think giving an instruction on Statute of Frauds would be appropriate. I think it would just confuse and mislead the jury, but your objection is noted.

Tr. Vol. IV, p. 3689, l. 22 - p. 3690, l. 6

The statute of frauds is the law. It is not the court's prerogative to decide whether or not the law will mislead the jury. Over objection, this court refused any instruction on the statute of frauds when he allowed ample testimony in contradiction to Idaho Code § 9-505. *See inter alia* R. at Exhibits 25 and 32; Tr. Vol. II, p. 1639, l. 10-15.

To make the court's error more egregious, despite not allowing the jury to be aware of the law of the statute of frauds, it presented the facts of an oral contract as law in jury instruction number 15. *See* R. Vol. II, p. 331. Defendants objected to this instruction. *See* Tr. Vol. IV, p. 3689, l. 8-21. The court essentially relieved Defendants of a defense that the law provides them without any justification or reasonable explanation. It then gives the jury an instruction that the oral contract is sufficient without any input on the statute of frauds. This is reversible error.

### *B. The court should have allowed testimony regarding statements and assurances made by Jacquie Kuhn as her husband's agent.*

It remains Defendants' position that statements made by Jacquie Kuhn are non-hearsay admissions by a party opponent. As already set out in Defendants' opening brief. An out of court statement is not hearsay if the "statement is offered against a party and is . . . . a statement by a party's agent or servant concerning a matter within the scope of the agency or employment of the servant or agent, made during the existence of the relationship." IDAHO R. EVID. 801(d)(2)(D). Plaintiffs make essentially two arguments as to why they believe these statements should not have been allowed into evidence. First, they argue that there was no agency relationship pursuant to this rule. And second, they argue that there was no offer of proof of what would have been said.

Plaintiffs argue that there was no agency in this matter despite statements from Darren Kuhn that the agency relationship existed. He admitted that he authorized Jacquie to sign exhibits five and six for him. Tr. Vol. II, p. 1515, l.1 - p. 1516, l. 4. An agency relationship requires authority from the principal. *See Vreeken v. Lockwood Eng'g, B.V.*, 148 Idaho 89, 218 P.3d 1150 (2009). That authority can be either actual or apparent. Actual authority is "that authority a principal expressly grants to an agent or impliedly confers on an agent because it is usual, necessary, and proper to achieve the object of the express authority granted to the agent." *Id.* at 1170. That granting of authority must not be in writing. Indeed if it is impliedly conferred on an agent as set out in *Vreeken*, it could not possibly be in writing. This was an express grant of authority admitted by Darren Kuhn to have Jacquie sign a number of documents. There was clearly an agency relationship.

Plaintiffs attempt to call into question whether there was actually an agency relationship in this matter by citing Idaho case law for the proposition that Jacquie Kuhn would have needed written permission to sign any documents relating to real property conveyances or encumbrances. *See* Resp't Br. 30, 44. Plaintiffs provide the following citation in support of this proposition: "The leasehold is an estate in real property. Since it belongs to the community of plaintiff and his wife, he cannot convey or encumber it without her signature and acknowledgment." *Coppedge v. Leiser*, 71 Idaho 248, 251 (1951); *See also* Resp't Br., 30, 44.

Plaintiffs miss the point. First of all, in *Coppedge*, there is nothing in the case that shows that the spouse who attempted to bind the other claimed to have their authority to do so or that in other parts of the transaction, the spouse admits the authority was granted expressly. *Coppedge* does not say that one spouse cannot give authority to another spouse to sign on his or her behalf if the agreement pertains to the conveyance or encumbrance of real estate. Plaintiffs have no support for the argument they need to make.

Secondly, the purpose is only to show that agency existed. If the agency existed, which it most certainly did, even according to Darren Kuhn, then Ms. Kuhn was an agent and her statements to others would be admissions of party opponents pursuant to 801(d)(2)(D). Darren Kuhn and his wife both stated under oath that she had permission to sign documents related to the transaction.

Plaintiffs' second argument is that there was no offer of proof made as to what would have been said. Plaintiffs' brief actually says "the transcript is devoid as to what she would have testified to at trial." Resp't Br. 44. Plaintiffs though misunderstand the arguments of Defendants' opening brief. It was the statements made by Defendants at trial regarding what Ms. Kuhn told them that were improperly excluded. Ms. Kuhn herself, as set out in detail above and in Plaintiffs' opening brief, was not available at trial. Defendant Todd Bohn attempted to testify as to statements Jacquie Kuhn made to him regarding permission given her from her husband to sign on his behalf, but was cut off.

Q. And Absolute Property Management was not a company with which [sic] Darren Kuhn had given any authority?

A. I was told by his wife that he had - -

Q. Excuse me - - excuse me - - please listen.

MR. HAWKES: Your Honor - -

THE COURT: Disregard what he just said about his wife.

Tr. Vol. I, p. 257, l. 8 - 17.

Though no formal offer of proof was made, the rule cited by Plaintiffs provides for situations like this. It provides in its entirety:

> (a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> . . .
>
> (2) **Offer of Proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> IDAHO R. EVID. 103(a)

The rule provides that if what was going to be offered was apparent from the context within which questions were asked, the court may find error. It is apparent that Todd Bohn was going to testify to Jacquie Kuhn's statements that she had the authority of her husband to act on his behalf. In addition, the court heard more arguments that were off the record in this matter. This fact is made clear by the court's and Plaintiffs' counsel's responses at various times.

At one point, counsel for Defendant was about to ask some questions of Dave Fuller regarding his conversations with Jacquie Kuhn, but stopped to ask the court permission first due to an earlier ruling apparently not in the record. The court responded by saying "is this some sort of motion in limine? The Court has made prior order on the alleged comments by Jackie [sic] Kuhn that are oral will not be admitted." Tr. Vol. III, p. 2886, l. 23 - p. 2887, l. 2. He then goes on to say "I don't think it would be proper to allow people to say what she allegedly told them about these transaction, but if you want the testimony, get her here." *Id.* at p. 2887, l. 4-7. This comment is particularly portentous considering the fact that her whereabouts were not disclosed as they should have been by Plaintiffs. Defendants could not "get her here."

Even Plaintiffs' counsel acknowledged to some extent that there had been rulings on whether testimony could come in as to what Jacquie Kuhn said. As Todd Bohn began to make such a statement, Mr. Hawkes interrupted him. He said "now, wait a minute here - - you heard the rulings." Tr. Vol. I, p. 254, l. 8-9. Clearly there was even more discussion of what Jacquie was going to say

than is in the record. But, even if there were no more discussion, it was quite clear from the context of the questions and answers what the response to the questions would have been– especially as regards Todd Bohn clearly about to testify as to Jacquie Kuhn giving him authority to sign and testifying about her authority from Darren Kuhn.

The Court at a different point and at the first instance in the record when it made a ruling on the matter, found that "the ruling will remain the same." Tr. Vol. I, p. 257, l. 25 - p. 258, l. 1. How can the ruling remain the same if there were no previous discussions on the matter. The court knew to what the testimony would have pertained. It ruled with full awareness. The requirement that the context of the questions make apparent what the answers would be is clearly met here.

If Darren Kuhn's wife had the authority to act as his agent for purposes of this real estate transaction, which authority Darren Kuhn admitted, Todd Bohn should have been allowed to testify as to statements made by Jacquie Kuhn pursuant to Idaho R. Evid. 801(d)(2)(D). She was definitely his agent, even by his own admission, and it was clear from the context of the questions to what Mr. Bohn would have testified.

***C. Les Lake's testimony was not going to be hearsay and should have been admitted.***

Hearsay is defined quite simply as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." IDAHO R. EVID. 801(c). The court ruled that Les Lake could not testify at all, but it was clear from the offer of proof and the discussion surrounding the offer, that at least some of what Les Lake would have testified to would not have been hearsay at all. *See* Tr. Vol. IV, p. 3093, l. 1 - p. 3099, l. 6.

The rule cited over and over again by Plaintiffs must be looked at closely. In order for 803(8) to come into play, the statement the court would exclude would have to be an out of court statement or not a statement made by the declarant while testifying at the trial. IDAHO R. EVID. 801(c). If a statement is an out of court statement, then the exceptions come into play. If it is not an out of court statement, there is no objection to be made. For Judge McDermott to be able to send Les Lake home without allowing him to testify to anything, **every** statement he would make would have to be

hearsay or otherwise objectionable.

Plaintiffs make much of the test of 803(8)(D) which states that the hearsay exception will not apply to "factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case." IDAHO R. EVID. 803(8)(D). This, however, is not in itself a basis by which one might exclude testimony. First the statement sought to be excluded must be hearsay, then the counsel seeking to get in the evidence would have to cite this section as an exception to the hearsay rule, then, finally, the counsel seeking to exclude the evidence would cite to this subsection. Simply because a factual investigation of a complaint was made, does not mean that all the testimony surrounding the investigation is hearsay.

Routinely, investigating officers will testify in personal injury actions. *See inter alia Contreras v. Rubley*, 142 Idaho 573, 578 (2006); *Bailey v. Sanford*, 139 Idaho 744, 749 (2004); *Smith v. Praegitzer*, 114 Idaho 147, 151 (1988). Pursuant to rule 803(8)(D), the report might be excluded because it, in itself, is an out of court statement. But the police officer testifying as to his observation is not hearsay and there is no reason to even argue that it is. It is the same here. Les Lake would have testified to what he did to investigate the matter, whom he talked to, and whether or not based on his investigation, he found any misconduct. None of that is hearsay. Indeed, Mr. Lake would have testified as to conversations he had with the Scheis. The Scheis are party opponents and any statements made against their interest would not be hearsay pursuant to Idaho R. Evid. 801(d)(2)(A).

The court, though, did not even allow counsel for Defendants to conclude the questioning of Mr. Lake. Counsel requested the opportunity to make an offer of proof, but before counsel could get to anything of substance, he was cut off by the court and asked what it is he would like to ask Mr. Lake. Tr. Vol. IV, p. 3097, l. 21-24. Mr. Lyons went on to explain a number of things, including statements by the Scheis, that would be admissible. *Id.* at p. 3097, l. 25 - p. 3099, l. 6. Yet, he was never allowed to continue his offer of proof. Just the fact that the court did not allow counsel to find out what the Scheis actually said to him should be enough to warrant a new trial in this matter

Plaintiffs, in support of their argument that Mr. Lake's testimony was rightly excluded, argue that the case of *Jeremiah v. Yanke Machine Shop, Inc.*, 131 Idaho 242 (1998), provides the Court with good reason to uphold Judge McDermott's ruling. Indeed, at first blush it may appear that this case is damaging to Defendants' arguments regarding Les Lake. The court below in that case ruled that the defendant could not introduce into evidence the determination of the Idaho Human Rights Commission ("IHRC") or the testimony of the director of the IHRC to "identify documents and testify concerning the IHRC's determination" based on Idaho R. Evid. 803(8)(D). *Jeremiah*, 131 Idaho at 245 (1998). This Court upheld that decision. The distinction here though is clear. The defendants in *Jeremiah* wanted the director of the IHRC to testify. The director of the IHRC surely did not perform the investigation. That means everything she would testify to would have to be hearsay. Idaho R. Evid. 803(8)(D) would exclude the testimony from the exception and thus it should not have been allowed. In the case at hand, however, Les Lake, who was an investigator for the Real Estate Commission, actually performed the investigation. He actually reviewed the documents and spoke with the complainants and the agents involved.

In addition, it is important to note that Plaintiffs' counsel made reference to conduct by Defendants that was illegal and grounds for revocation of their license. Specifically, counsel for the Scheis, in his opening argument said that "what these Defendants did in this case was illegal, and did you know that it's also grounds to revoke their licenses, as realtors either brokers or agents. You'll hear about that. That is the conduct that we believe is grounds for punitive damages." Tr. Vol. I, p. 134, l. 15-20. Surely if Plaintiffs are allowed to make such brazen statements, Defendants should be allowed to show that there was indeed an investigation and their conduct was NOT grounds for revocation of their licenses. Les Lake's entire testimony was excluded when the court should have allowed the testimony subject to possible individual objections regarding relevance or hearsay.

### *D. Darlene Manning should not have been allowed to testify that Defendants' conduct was outrageous.*

Plaintiffs argue that the allowance of the testimony of Darlene Manning was harmless error. Resp't Br. 18-19. They make this argument based on notes made by Defendants' expert witness that included some of the same terminology used by Ms. Manning in her testimony. The argument is misplaced. First of all, the ultimate opinion of Defendants' expert was that there was no outrageous conduct in this matter at all. Tr. Vol. IV p. 3255, l. 10-12. Though Mr. Galloway did have questions regarding the transaction and made notes regarding those questions, in the end, it was his opinion that there was no outrageous conduct at all. Plaintiffs fail to mention the ultimate opinion of Mr. Galloway and would prefer to hold him to his initial concerns before he was able to review the whole matter. Mr. Galloway, even after cross-examination, makes it abundantly clear that the notes from which Plaintiffs take their argument, are not reflective of his actual opinion. Tr. Vol. IV, p. 3474, l. 22 - p. 3478, l. 24. Clearly, this was not harmless error.

It is also not harmless error based on the fact that Mr. Galloway was only called as a witness to rebut the opinions set forth by Ms. Manning regarding the alleged outrageous conduct. Tr. Vol. IV, p. 3378, l. 4-8. If Ms. Manning's testimony had been kept to what is required under *Rockefeller*, Mr. Galloway would never have been called as a witness and his notes regarding Defendants' conduct would never have come in.

Defendants also continue to contend that Idaho law dictates that experts are not allowed to testify regarding whether or not real estate agents have breached their duty. *Rockefeller v. Grabow*, 136 Idaho 637 (2001). In that case as in this one, the court heard a case revolving around the fiduciary duty a real estate agent owes to his or her client. The district court refused to allow testimony from an expert witness regarding the standard of care of a real estate agent. The Idaho Supreme Court affirmed. The court ruled quite simply that the standard of care of agents is simple and does not require the assistance of experts. The court found as follows:

> The standard of care of an agent is clearly established by prior case law of this Court. As an agent, [Defendant] owed the [Plaintiffs] a duty of loyalty, good faith and fair dealing. Although the facts of this case are different from previous cases, the jury could readily apply the

facts to the legal standard without the assistance of expert testimony.

*Rockefeller v. Grabow*, 136 Idaho 637, 647 (2001) (citations omitted).

Again, as is the case here, though the facts of the case differ, the jury could readily apply the facts to the legal standard without the assistance of expert testimony.

As explained in the opening brief, while the expert, Ms. Manning was not allowed to testify as to the standard of care, she was allowed to testify as to whether or not the conduct of the Defendants was outrageous. Tr. Vol. III, p. 2561, l. 6 - p. 2562, l.5; *See also* Tr. Vol. III, p. 2620, l. 9-24. This allowed the Plaintiffs to get in the back door when they could not get in the front. If case law tells us that experts cannot testify as to whether there has been a breach of good faith, surely they cannot be allowed to testify as to whether the conduct was outrageous. Yet, Judge McDermott allowed Plaintiffs to do exactly that. Ms. Manning testified indirectly to what the court already ruled she could not testify to directly. Indeed, if the conduct was so egregious that it left the bounds of human decency, it must also not be in good faith as required by the law for real estate agents. Actions outside the bounds of honesty, good faith and fair dealing are like a subset of actions outside the bounds of human decency. It is akin to disallowing expert testimony in a car accident case on whether or not the expert believes that the defendant was negligent, but allowing that same expert to testify as to whether or not the defendant was grossly negligent.

If the jury in *Rockefeller* was allowed to decide whether or not the real estate agent breached his fiduciary duty to his clients, it follows that the jury in the case at hand should also be allowed to have so much trust placed in it. In allowing the expert witness to testify as to whether or not she believed the Defendants' conduct to be outrageous or not, the district court abused its discretion. Not only is that a decision that should be made by a jury without the input of an expert, but it in effect allowed the expert to testify that she thought the Defendants breached their fiduciary duty as well.

To further complicate the court's error, it then allowed a number of jury instructions regarding what constitutes outrageous conduct, an extreme deviation from reasonable standards of conduct, gross negligence, and wantonness. R. Vol. II, p. 369-372. These instructions clearly set forth the standard to be utilized by the jury to make a determination regarding the potential award of punitive damages making Ms. Manning's testimony superfluous and inflammatory. Essentially, the instructions say what the standard is and Ms. Manning says that it is met. Ms. Manning's testimony improperly took away the providence of the jury in reaching its decision by testifying that the conduct was outrageous. Considering that *Rockefeller* stands for the proposition that real estate agents' duty of care is simple and may not be testified to by experts in conjunction with these instructions, the jury had virtually no choice how to find.

***V. The District Court erred in its Rulings Regarding Jury Instructions given and those refused along with the Special Verdict Form.***

This brief along with the opening brief together have sufficiently presented Defendants' concerns with regard to the lack of an instruction for the statute of frauds. The court improperly took the matter out of the jury's hands. The statute of frauds was obviously applicable and, if the court was going to overrule the Defendants' objection as to evidence set forth regarding this alleged agreement, it certainly should have at least provided the jury with an instruction for the statute of frauds. This was a clear error of law. The Defendants' proposed jury instruction number 19 was not included in the court's final jury instructions. Counsel objected to the exclusion of the instruction and the inclusion of the instruction regarding contracts in general without the caveat of the statute of frauds. Tr. Vol. IV, p. 3689, l. 8-21.

Especially considering the closing argument of the Scheis attorney, an instruction should have been provided. As set out in Defendants' opening brief, in closing argument, the attorney for the Scheis reminded the jury that the Scheis were from a generation "who were raised with the ethic that a person's word is their bond, an ethic that you didn't need a promise to be in writing, your word and a handshake were enough." Tr. Vol. IV, p. 3866, l. 9-12. The attorney for the Scheis exploited

the error of the court when the jury should have been able to consider the law– which is that a writing is required in a situation like this.

Defendants continue to assert that the Special Verdict Form allows for double damages. The damages for a breach of contract in not buying the house when it could not be sold pursuant to the alleged oral agreement, are the same as a negligence claim or breach of fiduciary duty. Plaintiffs argue that the issue was not raised below, but indeed it was. When going over all of Defendants' objections to jury instructions, the issue was very clearly raised. Counsel for Defendants explained his concerns as follows:

> I guess my concern is this, Your Honor, if there is a general damage aware of, say, for example, $100,000, and it's an apportionment as to negligence, how does the Court deal with apportioning the final actual verdict amount when there might also be a breach of contract found by the jury . . . . I'm not sure how we do it Your Honor, but they're only entitled to one recovery . . . as long as we have one clear instruction, you know, they're only entitled to one recovery on all of the damages . . . . I guess we'll just make sure we made that on the record that we were concerned with that before the fact.
> Tr. Vol. IV, p. 3695, l. 21 - p. 3697, l. 12.

Defendants' other counsel then also made his concern known, repeating his concerns as to the possibility of double damages with the proposed special verdict form. He noted that he "would prefer to take the breach of contract out." Tr. Vol. IV, p. 3700, l. 3-4.

Plaintiffs' argument that the issue was not raised below fails and it is clear that a plaintiff cannot be entitled to duplicative damages. *See Umphrey v. Sprinkel*, 106 Idaho 700 (1983). Where Plaintiffs' damages would be the same whether under the breach of contract theory or the negligence theory, damages awarded for both must have been duplicative.

### *VI. The Award of Attorney's Fees is Improper*

Plaintiffs argue again that Defendants did not raise the issue of attorney's fees below. They cite the Idaho Supreme Court for the prospect that a party's failure to object to the action precludes a party for challenging that action on appeal. *See* Resp't. Br. 45-46; *Mackowiak v. Harris*, 146 Idaho

864 (2009). Defendants filed an objection to the attorney's fees motion made by Plaintiffs. R. Vol. III, p. 540-549. Additionally, Defendants' opening brief examines the issue quite closely. Plaintiffs' argument here fails.

### *VII. Conclusion*

Based on the foregoing and those arguments and citations made in Defendants' opening brief, the decisions of the district court should be reversed and this case should be remanded for a new trial. A close look at all of these matters, especially taken in their entirety is ample proof of an astoundingly unfair trial. The court made numerous errant rulings. These rulings, as set out above, have so prejudiced Defendants as to return an almost unconscionable result from the jury. For those reasons, the Appellants in this matter respectfully request that this Court find that the District Court made reversible errors and that the matter should be reversed and remanded for a new trial.

DATED this 29th day of January, 2010.

MERRILL & MERRILL, CHARTERED

By: Thomas J. Lyons

Thomas J. Lyons
Attorneys for Appellants

**CERTIFICATE OF SERVICE**

I, Thomas J. Lyons, the undersigned, do hereby certify that two(2) true, full and correct copies of the foregoing document was this 26th day of January, 2010, served upon the following in the manner indicated below:

Lowell N. Hawkes
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